

STATE OF NEW YORK

OFFICE OF THE ATTORNEY GENERAL

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DATE FILED: 8/15/08

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ELECTRONICALLY FILED

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DATE FILED: 9/12/08

[212-416-8561]

August 15, 2008

By FacsimileHon. P. Kevin Castel  
United States District Judge  
United States District Court  
Southern District of New York  
500 Pearl Street, Rm 2260  
New York, New York 10007MEMO ENDORSED *p2*Re: Joseph v. Fischer, et al., 08-CV-2824 (PKC)(AJP)

Your Honor:

I am an Assistant Attorney General in the Office of Andrew M. Cuomo, Attorney General of the State of New York, counsel for the served defendants in the captioned matter. I write, respectfully, for permission to file a partial motion to dismiss the complaint without the need for a pre-motion conference.

On July 17, 2008, a Rule 16 conference was held before Magistrate Peck at which time the Magistrate extended defendants' time to respond to the complaint until August 18, 2008. Defendants have decided to answer for some of the defendants and to move to dismiss as to others. Specifically, defendants wish to move to dismiss the complaint against Commissioner Brian Fischer and Superintendent James Conway on the ground of lack of personal involvement and as to Officer Carmen Cooper on the ground that plaintiff has failed to state a claim as to her. In the alternative, as to Superintendent Conway, defendants wish to sever and transfer all claims related to Attica Correctional Facility, located in Wyoming County, to the United States District Court for the Western District of New York

Following the July 17, 2008, conference, it was my mistaken belief that Magistrate Peck, would be the one to review defendants' partial motion to dismiss. Magistrate Peck does not require a pre-trial conference prior to making dispositive motions. However, after reviewing the March 27, 2008 Order of Reference to a Magistrate Judge, it became clear that Your Honor will review defendants' partial motion to dismiss.

Defendants respectfully request that Your Honor's requirement for a pre-motion conference be waived and that defendants be allowed to file their partial motion to dismiss on August 18, 2008. In the alternative, defendants respectfully request a pre-motion conference and an extension of their time to partially move to dismiss until a date following the conference

Thank you.

Respectfully submitted,

*Neil Shevlin*

Neil Shevlin

Assistant Attorney General

cc: Magistrate Peck (by facsimile)

Rodney Joseph (by first class mail)

## MEMO ENDORSED *8/15/08*

*While per letter - and the note -  
is returned to J. J. Court, I offer the  
following comments:  
1. with a copy of 9/15-2008  
at 10/17, I shall not  
have prepared notes and not be  
done before the court. I shall  
not get before you but to file at 5-  
10. So what's the benefit of this motion?  
I shall not have that a copy of the  
motion can be done. I shall  
be prepared to appear to a 5-10. I shall  
not have that the note  
3. Give of the note will be done in your power  
I shall not have that the note  
I shall not have that the note*

SO ORDERED:

*Andrew Jay Peck*  
Hon. Andrew Jay Peck  
United States Magistrate Judge

*Neil Shevlin (for)*  
Neil Shevlin (for)

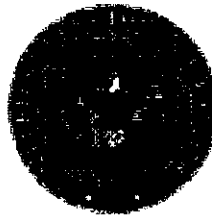
*Rodney Joseph*  
Rodney Joseph

**BY FAX**

**\*\* Transmit Confirmation Report \*\***P.1  
HON ANDREW J PECK SDNY Fax:212-805-7933

Aug 15 2008 04:36pm

Name/Fax No.	Mode	Start	Time	Page	Result	Note
912124166009	Normal	15,04:35pm	0'32"	3	# 0 K	BrdCast
912128057949	Normal	15,04:36pm	0'30"	3	# 0 K	BrdCast

**FAX TRANSMITTAL SHEET**

**ANDREW J. PECK**  
**UNITED STATES MAGISTRATE JUDGE**  
**UNITED STATES DISTRICT COURT**

Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1370  
New York, N.Y. 10007-1312

Fax No.: (212) 805-7933  
Telephone No.: (212) 805-0036

Dated: August 15, 2008Total Number of Pages: 3

TO	FAX NUMBER
Neil Shevlin, Esq.	212-416-6009

**TRANSCRIPTION:**

MEMO ENDORSED 8/15/08

While this letter – and the motion – is addressed to Judge Castel, I offer the following comments:

1. With a discovery cutoff of 9/15 and a SJ motion deadline of 10/17, it is clear that your proposed motion will not be decided before the close of discovery and probably not before you have to file a SJ motion. So, what's the benefit of this motion?
2. It's not clear that a lack of personal involvement motion can be decided based on the complaint as opposed to an SJ. Again, why bother with this motion?
3. Even if the motion were decided in your favor today, it likely would have no effect on discovery.

**NOTE** – Prior to sending this fax, we have learned that Judge Castel is not in today.

Copies to: Rodney Joseph (Mail)  
Judge P. Kevin Castel (Fax)